No. 8411.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

17

In the Matter of
JOSEPH H. GRANDE,
Bankrupt.

Joseph H. Grande,
Appellant,
vs.
Arizona Wax Paper Company and State Produce Exchange,
Appellees.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED.

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APPELLANT'S REPLY BRIEF.

On page 15 of appellees' brief, they have divided the questions involved into six subdivisions, the first of which is the order of February 4, 1935, asserted to be a final order. We again call the attention of the Court to the force of the order of February 4, 1935, which cites the following:

I.

A. That prior to March 2, 1934, the bankrupt was extensively indebted.

B. That his debtors were pressing him.

C. That one or more had obtained judgments against him.

D. That to delay and defraud his creditors he "assigned, transferred and set over without consideration automobiles, cash, merchandise, leases and contracts to Grande-California Inc."

E. This corporation was created "for the purpose of permitting the said Joseph H. Grande to do business without being hindered by his creditors so that he could retain possession of his property under the corporate name of Grande-California Inc."

F. The Court finds that no person invested any money either as a contribution to capital assets or otherwise, to Grande-California Inc. either at the time it was incorporated or at any time since, and that Joseph H. Grande is the owner in fact of said corporation, its corporate stock and all of its assets.

This last finding, if it means anything at all, means *"no person,"* Grande as well as no other person, invested any money at any time or contributed anything to the capital assets of any nature or description. No stock was issued and all of its assets belonged to Joseph H. Grande. This means, if it means anything, that Grande-California Inc. was incorporated but nothing was conveyed to it either in cash, money or anything else. No stock was issued and the corporation was simply incorporated with no vital existing force.

The preceding finding, D, charges that he "transferred automobiles, cash, merchandise, leases and contracts to

Grande-California Inc." This latter finding, F, destroys the preceding finding, D, for if he "transferred automobiles, cash, merchandise, leases and contracts to Grande-California Inc." then surely the corporation would have some assets or something of some character.

G. So far the findings mean nothing. There is a further finding that the attorney for Grande did not contribute any money to Grande-California Inc. but that the check paid to him was for legal services for the incorporating of Grande-California. This confirms finding F.

H. The next finding is that the daughter, Hazel D. Grande, and Gladys Fritz have at no time contributed any money to the capital assets of said corporation, or any money in payment of the stock, but there is no finding that any stock was ever issued to Hazel D. Grande, James Donovan or Gladys Fritz for any purpose.

I. The next finding that the assets of Grande-California Inc. have not been turned over to the trustee and that "he has not come into the possession thereof at this time."

The conclusion from these findings, if any conclusion can be drawn at all, is:

1. That Grande-California Inc. was created.

2. That Grande owned it and no one else had any interest in it whatever.

3. That Grande-California Inc. had no assets or any property at all.

4. Then the last finding that "Grande-California Inc. failed to turn over to the trustee its assets," was finding an impossibility when it also found that it had no assets.

Conclusions.

I. That the corporation, Grande-California Inc. is the *alter ego* of Joseph H. Grande, the bankrupt.

II. That the bankrupt, Joseph H. Grande, is the sole owner of all of the capital stock of said corporation and all of its assets.

III. The next conclusion is that Grande is the owner of everything.

These are all the conclusions found by the referee. There is no finding by the referee, or no conclusion from the finding, that Grande or any other person was holding, concealing or secreting any property of the bankrupt or that Grande failed to enumerate in his schedule of assets all of the things mentioned in the findings, "automobiles, cash, merchandise, leases and contracts," which were claimed to be turned over to Grande-California Inc.

There is a difference in the findings and conclusions in this: that the findings enumerate "automobiles, cash, merchandise, leases and contracts as assigned to Grande-California Inc." while the conclusions are that Grande is the sole owner of the corporation, its assets, "trucks, cash, merchandise, leases, contracts, personal property of every kind and description," but it does not specify any particular trucks, any amount of cash, any merchandise, any leases or any contracts that Grande did not turn over or enumerate in his schedule of assets.

From the findings and conclusions, here follows the order based thereon: it orders "the trustee to take immediate possession of all the assets of the bankrupt standing in the name of Grande-California Inc." There is no finding that specific property of Grande is held in the

name of Grande-California Inc. The next paragraph under the order is an additional finding which had been heretofore found that Grande was in control of the corporation. The last order is an injunction against Hazel D. Grande, Daisy Grande and others "from interfering with the possession, use and occupation of the assets of Grande-California Inc. by the trustee in bankruptcy."

From the foregoing it will be seen that this is not a judgment in any sense of the term, "judgment." It was an order against Grande individually. It was an order against Grande-California Inc. It was an order to the trustee to take possession of automobiles, cash, merchandise, leases and contracts either in the possession of Grande-California Inc. or in the possession of Grande. It was in the nature of a mandatory injunction as against Grande and an injunction against other persons named against interfering with the trustee. While it is true that the bankrupt endeavored to bring this matter before the District Court he was unable to do so for the reason that the Court held it had no jurisdiction, that the attempt to bring it before the District Court was too late. There was but one purpose which this order of February 4, 1935, could serve—to take from Grande what the turn-over stated that he had not turned over in his original schedule, but the order is fatally defective in that the petition to secure the turn-over order is recognized as extraordinary procedure and must be issued with great care and must have some foundation upon which to base it. The petition upon which the order is based originally was sworn to by the trustee *on information and belief*. The referee denied the order upon that ground and permitted the trustee and his attorney to prepare a verification, not upon information and belief, but that it must be sworn to upon

the "absolute allegation of fact." The order itself shows that when the Court denied the order by reason of its want of verification, as required by law, that it did not take the attorney for the trustee but a few moments to write a verification of "absolute allegation of fact." If the trustee obeyed this mandatory order it was his duty and his attorney's duty "forthwith to take immediate possession of all the assets of the bankrupt standing in the name of Grande-California Inc." and if he did not do so and was prevented from doing so it was either his duty to make a return under the turn-over order to the Court that there were no such assets as "automobiles, cash, merchandise, leases and contracts" that were in the possession of Grande, or if there were such in the possession of Grande that Grande should have been cited for contempt of court and upon his refusal to turn over what was charged as being in his possession, he should have been committed to jail for contempt for disobeying the order, but so far as the record shows neither did the trustee make any return to the Court that there were no such property belonging to the bankrupt delivered to him, nor to specifically set forth what he knew to be in the possession of Grande or under his control and have Grande arrested.

This order of February 4, 1935, is the only claim upon which the protest against the discharge of the bankrupt, Grande, is based. The allegations of objections to the discharge are known and recognized by all of the Courts in bankruptcy as pleadings and they must be subject to the same rules of pleadings both in civil and criminal procedure. It is unnecessary to cite cases in support of this proposition for it is well settled and recognized. In each of the protests against the discharge of the bankrupt, this order of February 4, 1935, is made the basic ground upon

the objection. When the order in reference was made to the Special Master, Dickson, this turn-over order was introduced in evidence over the objections of bankrupt and the Special Master in his findings recites the fact that it was upon this turn-over order and other evidence offered before Referee Turnbull, upon which he based his findings and report to the District Court. This procedure upon the face of it, and as reported by the Special Master, shows that he had no authority and was in violation of the law to review any findings of the original referee but that he must hear independent evidence based upon the allegations set forth in the protest against the discharge. This, in itself, destroys the force and effect of the findings of the Special Master.

II.

To sustain the order of February 4, 1935, as a final order, certain cases have been cited.

On page 16, appellees' brief, *Page v. Arkansas Natural Gas Corp.*, 286 U. S. (76 L. Ed. 1096), the only thing decided by that case is this, that a referee in bankruptcy has jurisdiction if the parties consent to have him hear and determine an adverse claim of title to property in possession of the trustee in bankruptcy, and that was all that was involved in that case.

The next case cited, which is quoted at length on page 17 of appellees' brief and cited on page 18, is *Oriel v. Russell*, 278 U. S. 358, 73 L. Ed. 419. This gives the appellees very little comfort.

> "With reference to the character or degree of proof in establishing a civil fraud, the authorities are quite clear that it need not be beyond reasonable doubt,

because it is a civil proceeding. Lalone v. United States, 164 U. S. 255; United States v. American Bell Telegraph Co., 167 U. S. 224, 42 L. Ed. 144.

"The Court ought not to issue an order lightly or merely on a preponderance of the evidence, but only after full deliberation and satisfactory evidence, with the understanding that it is rendering a judgment which is only to be set aside on appeal or some other form of review, or upon a properly supported petition for rehearing in the same court.

"A turn over order must be regarded as a real and serious step in the bankrupt proceedings and should be promptly followed up by commitment unless the bankrupt can show a change of situation after the turn over order relieving him from compliance. There is a possibility, of course, of error and hardship, by the conscience of judges in weighing the evidence of a clear perception of the consequences, together with the opportunity of appeal and review, if properly taken, will restrain the courts from recklessness of bankrupt's rights on the one hand and prevent the bankrupt from flouting the law on the other."

Objection number 2, page 19, appellees' brief, "Objections of the Appellee Creditors have been filed in pursuance to General Order No. XXXII." This means that there has been an attempt, on the part of the appellees in their objections to the discharge of the bankrupt to proceed under General Order XXXII, and cites the case of *Lerner v. First Wisconsin Nat. Bank,* 294 U. S. 116, 79 L. Ed. 796, which does not sustain in any way the sufficiency of the objections to the discharge of the bankrupt as will be seen by the following:

"The conclusive effect in a proceeding of this sort of an order of 'turnover' finds its analogy in the inquiry in contempt proceedings for violating an injunction issued by a court of general jurisdiction."

That portion cited under subdivision 3 of appellees' brief, page 21, to sustain the order of February 4, 1935, quotes section 14 (b), subdivision 4, of the Bankruptcy Act, does not sustain the objections to the discharge of the bankrupt nor is there any finding in the order of February 4, 1935, that establishes any fact that would bring it within subdivision 4 of section 14 (b) of the Bankruptcy Act. The only way by which such an application could be made of that section would be as follows: if Grande under the order of February 4, 1935, was found to have property that he did not deliver, or if the trustee as directed to take possession of the property of the bankrupt had done so (and then the Court found that it existed as a fact), that Grande did have property that he did not turn over to the trustee but that the trustee found this property, then made a report to the Court, there would be some basis upon which to deny the discharge of the bankrupt.

There is no decree or judgment entered upon the writ or order to the trustee. The trustee would have to first file and make a return of property that Grande concealed before a final order could be made or before the order of February 4, 1935, was determined or considered as a final order.

Under section 14 (b), subdivision (4), in our opening brief we have pointed out to the Court that the Courts will not permit frivolous matters to be a bar to the discharge of a person in bankruptcy:

> "Allegations sufficient to show that all essential facts existing bring the opposition within the grounds specified by the statute, * * * they should be pleaded with greater particularity than complaints in civil actions; indeed, they more nearly resemble indictments."

Under subdivision 5, appellees' brief, page 24, there is cited *Freshman v. Atkins,* 269 U. S. 121, 70 L. Ed. 193. The only point decided in that case is as follows: "the pendency of a voluntary proceeding in bankruptcy precludes the consideration of a second such proceeding in respect of the same debts." The second point decided was that "the court may of its own motion deny a discharge upon a voluntary petition in bankruptcy where a former voluntary petition for discharge is pending with respect to the same debts included in the second petition."

The last subdivision 6, appellees' brief, page 26, "Findings of a Special Master or Referee Approved by the District Court Are Conclusive of the Question of Fact and Will Not be Disturbed Except in Case of Gross Error." That may be true as an abstract proposition but in order to assume and support it as a concrete proposition all the elements and definite procedures up to the final approval of the District Court must be of such character that a Court of Equity must say that no injustice has been done the bankrupt. The appellant in this case has assigned not only the ruling of the Special Master and pointed out the infirmities of his report but called to the attention of the District Court those infirmities and violations of the express duties of the master in this: That the Special Master was clothed with no authority either in law or in fact to review the facts of his predecessor, Turnbull, and had no authority to admit as evidence be-

fore the Special Master any evidence that was before the original referee and to accept the findings of the original referee as his own, to admit in evidence the turn-over order and to accept it as evidence was without any justification whatever, and the District Court was without authority to confirm the report of the Special Master which on its face discloses that he violated his duty in the admission of evidence and in adopting the ruling of his predecessor as part of the facts found by him when the law expressly declared:

> "Neither should the new Master use the record of the Referee upon which to base his findings." (162 Fed. 983.)

Sufficiency of Verification.

As to the sufficiency of verification to a protest against the discharge of a bankrupt wherein the petition has been verified on information and belief, there is some variance in the opinions in the Circuit Courts of the United States. The earlier cases were inclined to hold that a verification need not be positive but the later cases hold where a verification is made that the statements are true to the best of the affiant's knowledge, information and belief, *is insufficient*. We find, *Re Abramovitz,* 253 Fed. 299; *Re Slatkin,* 286 Fed. 242; *Re Grossberg* (1926 D. C.), 11 Fed. (2d) 329, in which it is held that the verification must be other than on information and belief. In *Re Glass,* 119 Fed. 509 (1902 D. C.), the Court says:

> "In the very beginning there was a rule made by this Court that attorneys should not be allowed to verify by oath the pleadings and proceedings in bank-

ruptcy practice. The foregoing authorities show conclusively that such is the general rule in all courts, unless it has been changed by statute, and there is no act of Congress permitting it. Where there is no statute, the practice in equity—and it is the same in bankruptcy—is that, when a party had to sign the pleadings (as, for instance, an answer in chancery), or when a party had to verify the pleading, the signing or verification had to be done personally, and could not be done by attorney, both as to natural persons and as to corporations. In extraordinary circumstances—as, that the party was beyond seas, or was mentally or physically incapacitated, or where the facts were peculiarly within the knowledge of the attorney, or the like—the court could make a special order that the signature and oath might be made by an agent or attorney; but always the previous order must be had, and the form of verification and signature must set out the special facts as a reason for the departure from ordinary practice; and this rule was very strict. The reason for it is plain,—that the adversary party shall have the responsible person bound by his own act, so that he should not be able to repudiate it, and put the other to the proof of an express or implied authority in the attorney, who might have neither, and, in the absence of a statutory authority, would have neither, except where the preliminary order of the court before mentioned had provided against that absence of authority. Etc."

This is a very clearly stated case and is the trend of modern procedure in bankruptcy matters. The Court in closing the opinion says: "There can be no implied authority, therefore, from the act itself, the orders, or the forms, for any signature or verification by an attorney."

Conclusion.

With the foregoing suggestions we submit to the Court the following points involved in this appeal.

I.

What is termed the turn-over order by appellees, or the order of February 4, 1935, cannot in law or in fact be classed a turn-over order. If it has any legal significance, it is an order to show cause. No action was ever taken or anything done by the trustee under this order.

II.

It is not, as termed by appellees, a judgment or a final order.

III.

The denial of the District Court to hear the order to show cause against the trustee, Turnbull, dismissing the same determined nothing except the fact that the Court had no jurisdiction to hear the same for the reason that a petition for review was not filed within ten days after the rendition of the order to show cause, or what is termed the turn-over order.

IV.

The recitals in the order to show cause as facts and the charges made in the order to show cause against the bankrupt were never passed upon either by the referee, Turnbull, or the District Court. Hence there could be no judgment based upon the accusations without hearing

thereon. Whatever classification, or force, is to be given to the order of February 4, 1935, is only a procedural order directing the trustee to take possession of all the assets of the Grande-California Inc. Failure to disclose what the trustee did, or did not do, under that order does not validate or give any force or effect to it.

V.

Before the order of February 4, 1935, could have any force or effect to prevent Joseph H. Grande, bankrupt, from being discharged the substance of the charges in the order would have to be clearly established. The trustee should have obeyed the order, taken possession of what property the Grande-California Inc. had, and reported to the trustee what he actually took possession of as property of the Grande-California Inc. If he found no property of Grande-California Inc. then he should have so reported to the referee. This would have vindicated not only the trustee in this, that he obeyed the order of the referee, and would likewise have vindicated the bankrupt, but this order is held over the bankrupt as an indictment or a warrant of arrest unexecuted and when the bankrupt asked to be discharged the trustee remained silent, the referee who made the order of February 4, 1935, remained silent but the attorney for the trustee, not in behalf of the trustee but in behalf of a personal client, a creditor of the bankrupt, goes into Court and attempts to use this indictment as a ground of objection to the discharge of the bankrupt. Such conduct cannot be justified in law or in fact.

VI.

It will be remembered that Grande-California Inc. was not in bankruptcy nor was any effort made on the part of trustee to involve the Grande-California Inc. in bankruptcy. Moreover there was no finding made by trustee, Turnbull, that would, on its face, justify the trustee in executing one for no specific property was pointed out anywhere of any kind or character that was concealed by the bankrupt, Grande, or left out of, or undisclosed in his schedule of assets.

VII.

Benjamin W. Shipman had no right to verify the protest against the discharge of Grande, the bankrupt, and had no authority to verify the protest on information and belief. The protest against the discharge of Grande being recognized as a pleading in bankruptcy procedure shows upon its face that it is insufficient upon which to base any protest whatever.

VIII.

The District Court erred in referring the matter of the protest to the Special Master, Dickson, in that specifications in the protest were wholly insufficient and if heard in the state courts over motion or demurrer would have been stricken from the record.

IX.

As appellant has heretofore pointed out, the special master and counsel for protestant so conducted the protest

that the findings of the special master upon the face of them disclose that he based his findings and conclusions upon evidence that was not admissible under any circumstances and reviewed and adopted as the substance of his findings what is set forth in the order of February 4, 1935, termed by appellees as the turn-over order.

Appellant respectfully submits that upon the record and the citations that appellant has made, and the facts clearly disclosed to the Court the ruling of the District Court approving the report of the Special Master and denying the discharge of the bankrupt, Grande, is erroneous, unjustified, and should be reversed.

Respectfully submitted,

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